Filed 3/30/10 P. v. Roland CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

BRIANT ROLAND,

Defendant and Appellant.

F058284

(Super. Ct. No. 09CM1062)

OPINION

THE COURT[*]

APPEAL from a judgment of the Superior Court of Kings County. Louis F. Bissig, Judge.

Deborah Prucha, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the State Attorney General, Sacramento, California, for Plaintiff and Respondent.

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[*] Before Levy, Acting P.J., Cornell, J., and Poochigian, J.

STATEMENT OF THE CASE

On May 7, 2009, appellant, Briant Roland, was charged in an information with felony corporal punishment or injury on a child (Pen. Code, § 273d, subd. (a), count one),[1] misdemeanor battery on a person in a dating relationship with appellant (§ 243, subd. (e)(1), count two), and misdemeanor possession of not more than 28.5 grams of marijuana (Health & Saf. Code, § 11357, subd. (b), count three). There was also an allegation that appellant had served a prior prison term within the meaning of section 667.5, subdivision (b).

On May 22, 2009, appellant waived his constitutional rights pursuant to *Boykin*/*Tahl*.[2] The court advised appellant of the consequences of admitting the allegations. Appellant agreed that the evidence presented at the preliminary hearing constituted a factual basis for his plea.[3] Appellant pled guilty to count one. The remaining counts and the enhancement were dismissed.

On June 23, 2009, the court conducted a *Marsden* hearing.[4] Appellant claimed defense counsel told him he had a "pretty good case" and later told appellant there was no way he could win. Appellant felt defense counsel did not take time to look at his case or

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1 Unless otherwise indicated, all statutory references are to the Penal Code.

2 *Boykin v. Alabama* (1969) 395 U.S. 238; *In re Tahl* (1969) 1 Cal.3d 122.

3 On April 13, 2009 at 12:35 a.m., Officer Stephanie Walters was dispatched to a residence where Officer Cody was trying to calm down appellant and his girlfriend. The girlfriend told Walters she had gone to a party earlier that evening with appellant and he was still upset over an argument he had gotten into with a friend. The girlfriend's son, D., told Walters appellant got into an argument with his mother and then pushed and punched her. D., who was under age 18, tried to protect his mother. Appellant punched him twice in the jaw. Walters described D. as covered in dirt and his torn T-shirt hanging down to his waist. When D. ran away from appellant, appellant slammed D. into the bushes, choked him, slammed him into a brick wall, and threatened to kill him. D. had scrapes on his knuckles and a bump on the left side of his head.

4 *People* v. *Marsden* (1970) 2 Cal.3d 118.

to consult with him. Defense counsel explained that he would never tell a defendant he did not have a chance to win and counsel did go over the strengths and weaknesses of appellant's case with him. Appellant then asserted that he was the victim of the minor, D., and denied fighting back. The court denied the motion.

The court proceeded from the closed hearing to sentencing. Defense counsel indicated that appellant told the probation officer he wanted to withdraw his plea. Appellant wrote a letter to the trial court.[5] The court found that appellant's letter added few, if any, factual insights. The court reviewed the transcript of appellant's change of plea and noted it had not been offered any evidence to support appellant's assertion of being innocent. The court found no basis for a continuance for appellant to file a formal motion to withdraw his plea. The court imposed the upper prison term of six years.

Appellant filed a timely notice of appeal. The trial court denied his certificate of probable cause.

APPELLATE COURT REVIEW

Appellant's appointed appellate counsel has filed an opening brief that summarizes the pertinent facts, raises no issues, and requests this court to review the record independently. (*People v. Wende* (1979) 25 Cal.3d 436.) The opening brief also includes the declaration of appellate counsel indicating that appellant was advised he could file his own brief with this court. By letter on October 26, 2009, we invited appellant to submit additional briefing. To date, he has not done so.

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[5] In the letter, appellant states he pled guilty because his lawyer was rushing him, at first said he had a good case, and then told him he could not win. Appellant said his attorney did not spend time on his case and he would like to withdraw his plea.

After independent review of the record, we have concluded there are no reasonably arguable legal or factual issues.[6]

DISPOSITION

The judgment is affirmed.

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[6] The Legislature amended section 4019 effective January 25, 2010, to provide that any person who is not required to register as a sex offender, and is not being committed to prison for, or has not suffered a prior conviction of, a serious felony as defined in section 1192.7 or a violent felony as defined in section 667.5, subdivision (c), may accrue conduct credit at the rate of four days for every four days of presentence custody.

This court, in its "Order Regarding Penal Code section 4019 Amendment Supplemental Briefing" of February 11, 2010, ordered that in pending appeals in which the appellant is arguably entitled to additional conduct credit under the amendment, we would deem raised, without additional briefing, the contention that prospective-only application of the amendment violates the intent of the Legislature and equal protection principles. We deem these contentions raised here.

We explained in the recent case of *People v. Rodriguez* (Mar. 1, 2010, F057533) __ Cal.App.4th __ [pp. 5-12].), however, that the amendment is not presumed to operate retroactively and does not violate equal protection under law. Appellant is, therefore, not entitled to additional conduct credit under the amendment to section 4019. It is unclear from the probation report whether appellant's adjudication for burglary as a juvenile was for first degree burglary. If it was, appellant would be disqualified from receiving presentence credits even if they could be applied retroactively (§ 1192.7, subd. (c)(18)).